We must emphasize that for any Court to reach such a similar decision on an application under O.18 r.19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

We therefore allow the appeal herein by restoring the decision of the learned Registrar in question in striking out the amended statement of claim and also dismissing the claims of the plaintiff/company in the civil suit concerned herein. The respondent will have to pay costs here and below.

UNITED MALAYAN BANKING CORPORATION BERHAD

v.

PEMBINAAN KSY SDN. BHD. & 2 ORS.

SUPREME COURT, IPOH
TUN DATO' SERI ABDUL HAMID BIN OMAR LP, TAN SRI DATO' MOHD. EUSOFF BIN CHIN SCJ, DATUK MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ.
[CIVIL APPEAL NO. 03-101-92]
9 JULY 1993

PRACTICE & PROCEDURE: Application for summary judgment - Whether amended defence disclosed arguable or triable case - Approach to be taken by appellate Court in an O. 14 Rules of the High Court 1980 appeal.

The appellant granted the first respondent banking facilities in consideration of which the second and third respondent together with another executed a continuing guarantee and indemnity in favour of the appellant for due repayment of the total principal sum advanced to the first respondent together with interest.

The first respondent defaulted in repayment of the facilities and the appellant commenced legal action against the respondents for the sum of RM2,745,455.32 being the amount due and owing by the respondents as at 30 December 1988 together with interest and costs.

The respondents claimed that when the appellant recalled the facilities, the first respondent sought permission to dispose of all their public quoted shares which had been mortgaged to the appellant which permission was refused. The shares were in fact only disposed of after their price had fallen. The questions that arose for determination was whether this defence disclosed an arguable or triable case and whether the appellant owed a duty of care to the respondent, and if so, whether that duty of care had been properly or reasonably exercised in obtaining the best price for the said shares.

The High Court Judge allowed an appeal by the respondents against the decision of the Registrar giving leave to the appellant to sign final judgment under O. 14 Rules of the High Court 1980 and the appellant appealed.

Held:

[1] The approach to be taken by an appellate Court in an Order 14 appeal has been settled. The appellate Court should not regard the appeal as reviewing the exercise of the Judge's discretion but should approach the appeal as a rehearing.

[2] When a triable issue arises as a matter of evidence and fact, it is most unlikely that the appeal Court would interfere with the discretion of the Judge below.

[3] In the present case the Judge's finding that it was arguable whether the appellant as mortgagees had exercised their duty of care and whether the appellant had acted in good faith in the disposal of the securities are derived from the evidence and the circumstances found in the case. Since the triable issues, as found by the Judge, arose as a matter of evidence, it would be wrong for the Court to interfere with the learned Judge's discretion.

[4] Upon considering the issues raised in the amended defence the Court was in complete agreement with the conclusions of the learned Judge that this was not an appropriate case for summary judgment.

[Appeal dismissed with costs].

[**Bahasa Malaysia** Translation of Headnote]

AMALAN & PROSEDUR: Permohonan untuk penghakiman terus - Sama ada pembelaan yang dipinda mendedahkan kes yang boleh dibicarakan atau dihujahkan - Pendekatan perlu diambil oleh Mahkamah rayuan dalam satu rayuan A.14 Kaedah-Kaedah Mahkamah Tinggi 1980.

Perayu telah memberikan kepada responden pertama kemudahan urusan bank sebagai balasan di mana defendan kedua dan ketiga bersama-sama dengan seorang lagi menandatangani satu perjanjian jaminan dan indemniti berterusan bagi manfaat perayu untuk pembayaran balik akan jumlah wang pokok yang didahulukan kepada responden pertama bersama-sama dengan faedahnya.

Responden pertama telah memungkiri pembayaran balik akan kemudahan tersebut dan perayu memulakan tindakan undang-undang terhadap para responden untuk wang berjumlah RM2,745,455.32 yang merupakan jumlah wang yang patut dibayar dan terhutang oleh para responden sebagaimana pada 30 Disember 1988 bersama-sama dengan faedah dan kos.

Responden-responden mendakwa bahawa apabila perayu menarik balik kemudahan tersebut, responden pertama telah memohon kebenaran untuk melupuskan kesemua saham umum mereka yang telah digadai-janji kepada perayu dan kebenaran tersebut telah ditolak. Saham-saham tersebut hanya dilupuskan selepas harganya jatuh. Persoalan yang timbul untuk keputusan ialah sama ada pembelaan ini mendedahkan kes yang boleh dibicarakan atau dihujahkan dan sama ada perayu mempunyai satu kewajipan berjaga-jaga kepada responden, dan jika ya, sama ada kewajipan berjaga-jaga tersebut telah diamalkan dengan wajar dan munasabah dalam mendapatkan harga yang paling baik untuk saham-saham tersebut.

Hakim Mahkamah Tinggi berkenaan telah membenarkan suatu rayuan oleh para responden terhadap keputusan pendaftar dengan memberikan kebenaran kepada perayu supaya menandatangani penghakiman muktamad di bawah A.14 Kaedah-Kaedah Mahkamah Tinggi 1980 dan perayu telah merayu terhadapnya.

Diputuskan:

[1] Pendekatan yang patut diambil oleh Mahkamah rayuan dalam suatu rayuan Aturan 14 telah diselesaikan. Mahkamah rayuan tidak harus menyifatkan rayuan tersebut sebagai menyemak semula amalan budibicara Hakim yang berkenaan tetapi haruslah mendekati rayuan tersebut sebagai suatu pendengaran semula.

[2] Apabila sesuatu kes yang boleh dibicarakan bangkit sebagai suatu perkara keterangan dan fakta, Mahkamah rayuan tidak akan mencampuri urusan budibicara Hakim tersebut.

[3] Dalam kes semasa ini kedapatan Hakim tersebut bahawa boleh dihujahkan sama ada perayu sebagai pemegang gadai-janji telah menjalankan kewajipan berjaga-jaga mereka secara tulus ikhlas dalam melupuskan sekuriti-sekuriti didapati daripada keterangan dan keadaan-keadaan yang ditemui dalam kes tersebut. Memandangkan isu-isu yang boleh dibicarakan, sebagaimana yang didapati oleh Hakim berkenaan, berbangkit sebagai suatu

perkara keterangan, adalah salah bagi Mahkamah untuk mencampuri urusan budibicara Hakim tersebut.

[4] Setelah menimbangkan isu-isu yang dibangkitkan dalam pembelaan yang dipinda, Mahkamah bersetuju dengan kesimpulan Hakim yang bijaksana tersebut bahawa ini bukanlah suatu kes yang sesuai untuk penghakiman terus.

[Rayuan ditolak dengan kos].

Cases referred to:

China and South Sea Bank Ltd. v. Tan Soon Gin @ George Tan [1990] 1 AC 536 ***(refd)***

Standard Chartered Bank Ltd. v. Walker & Anor. [1982] 3 All ER 938 ***(refd)***

Kian Choon Investments (Pte) Ltd. v. Societe Generale & Anor. [1990] 2 MLJ 74 ***(refd)***

Bishop v. Bonham [1988] 1 WLR 742 ***(refd)***

Kok Siak Poo v. Perkayuan OKS Sdn. Bhd. & Ors. [1989] 1 CLJ 30/[1989] 3 MLJ 164 ***(foll)***

Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] 1 CLJ 246/[1987] 2 MLJ 183 SC p. 185 ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn. Bhd. [1984] 2 CLJ 220/[1984] 2 MLJ 300 ***(refd)***

European Asian Bank v. Punjab & Sind Bank (No. 2) (C.A.) [1983] 1 WLR 643/[1983] 2 All ER 508, 516 ***(refd)***

Cow v. Casey [1949] 1 All ER 197/[1949] 1 KB 474 ***(foll)***

Lloyds Bank Ltd. v. Ellis-Fewster [1983] 1 WLR 559 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14

For the appellant - Hira Singh (Asbir Kaur with him); M/s. Asbir, Hira Singh & Co.

For the respondents - G. Sri Ram (P.S. Gill with him); M/s. Gill & Tang

JUDGMENT

Mohamed Dzaiddin Bin Hj Abdullah SCJ: This appeal arises from the decision of Zakaria J. given on 5 December 1992, allowing an appeal by the respondents against the decision of the Registrar giving leave to the appellant to sign final judgment under O. 14 Rules of the High Court against the respondents for the sum of RM2,745,455.32 as at 30 September 1988 with further interest and costs.

The brief facts of the case are these. On 5 August 1983, the appellant granted to the first respondent banking facilities for a total amount of RM7,000,000 and in consideration thereof, the second and third respondents together with Kuah Sai Yok (deceased) executed a continuing guarantee and indemnity on 24 October 1983 in favour or the appellant for due repayment of the said total principal sum advanced to the first respondent together with interest. The first respondent defaulted in the repayment of these facilities. The appellant then sent notices of demand to the respondents and Kuah Sai Yok (deceased), demanding payment of the sum of RM2,619,032 due and owing as at 22 April 1988 together with interest. On 24 November 1988, the appellant commenced legal action against the respondents claiming for the sum of RM2,745,455.32 being the amount due and owing by the respondents as at 30 December 1988 together with interest and costs.

On 9 January 1989, the respondents and Kuah Sai Yok (deceased) filed the defence, which was later amended on 5 March 1990 to include the counterclaim. For the sake of clarity, we quote the relevant paragraphs of the amended defence which are as follows:

> 6. On 30 March 1988, the plaintiff suddenly and without just cause recalled the facilities granted to the first defendant notwithstanding that the defendant's properties and the public quoted shares were still being held by the plaintiff.
>
> 10. In order to be able to comply with the conditions referred to above on 17 August 1989, the first defendant wrote to the plaintiff seeking permission to dispose off all their public quoted shares to repay the plaintiff RM750,000 as opposed to the RM500,000 requested by the plaintiff which proposal was rejected by the plaintiff.
>
> 11. On 7 September 1989, the first defendant wrote to the plaintiff once again requesting that the said shares be disposed off and again the plaintiff refused to accede to the first defendant's requests.
>
> 12. The defendants contend that had the plaintiff disposed off the shares as requested, they would have recovered a sum of no less than RM7 million which figure covers the amounts unreasonably demanded by the plaintiff and that it is as a result of the plaintiff's own negligence that it has had to resort to this legal action.
>
> 15. The defendants aver and will aver the plaintiff wrongfully recalled the said facilities and in breach of the agreements entered into between the plaintiff and the

first defendant refused to allow the first defendant to liquidate its assets.

The issues on the appeal, that is, whether or not the amended defence discloses an arguable or triable case, are dealt with by the learned Judge in his written judgment (pp.15-48 AR). The learned Judge approached the matter in the following manner. He addressed himself on two principal issues namely, whether the public-quoted shares were pledged or mortgaged by the first respondent to the appellant and, secondly, whether the appellant owed a duty of care to the respondent, and if so, whether that duty of care had been properly or reasonably exercised in obtaining the best price for the said shares.

On the first issue, after considering the written submissions of Counsel and examining the relevant laws on the pledge and the affidavit evidence, the learned Judge was satisfied that the transaction between the parties in respect of the said public-quoted shares was not one of pledge but of a mortgage, and that the parties had intended that the said public-quoted shares were to be mortgaged and not pledged to the appellant.

On the issue whether the appellant as mortgagee owed a duty of care to the first respondent with respect to the disposal of the said public-quoted shares, the learned Judge examined the authorities cited by Counsel, particularly the Privy Council decision in *China and South Sea Bank Ltd. v. Tan Soon Gin @ George Tan* [1990] 1 AC 536, which was heavily relied on by Counsel for the appellant, and the decisions in *Standard Chartered Bank Ltd. v. Walker & Anor.* [1982] 3 All ER 938; *Kian Choon Investments (Pte) Ltd. v. Societe Generale & Anor.* [1990] 2 MLJ 74; and *Bishop v. Bonham* [1988] 1 WLR 742. The learned Judge refused to follow *China and South Sea Bank Ltd. (supra)* on the ground that the situation in that case was different from the facts in the instant case.

Upon a thorough consideration of the whole matter, the learned Judge came to the following conclusions:

> On 19 March 1990, Jimmy Chong Chee Ming informed the plaintiff by letter that the closing price on 16 March 1990, was RM4.04 per share. On 27 March 1990, the plaintiff wrote to the defendant that it would "sell the shares immediately."
>
> The plaintiff however did not sell the shares immediately. It took the plaintiff more than two months before they decided to sell the shares and according to Mr. Kuah Tian Nam in his affidavit affirmed on 8 October 1991, by that time the price of the shares had gone down to RM2 per share.
>
> From the evidence and the circumstances of this case, it is arguable whether the plaintiff, as mortgagee exercised their duty to take reasonable care to obtain proper price. It is also arguable whether the plaintiff acted in good faith in the disposal of the said shares or whether the plaintiff took reasonable steps to obtain the best price. On 27 March 1990, the plaintiff agreed to sell the shares immediately. Yet the plaintiff did not do anything until after the expiry of more than two months. It can be argued that the conduct of the plaintiff was that, to borrow Thean J's words, of "calculated in difference to the position of the mortgagor".
>
> In the circumstances this is not a proper case for summary judgment. There are triable issues which should be decided at the trial.
>
> (pp. 32 & 33 AR).

The approach to be taken by an appellate Court in an Order 14 appeal has been settled. The appellate Court should not regard the appeal as reviewing the exercise of the Judge's discretion but should approach the appeal as a rehearing. This principle was accepted by this Court in *Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. & Ors.* [1989] 3 MLJ 164, following *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183 SC p. 185, *National Company for Foreign Trade v. Kayu Raya San. Bhd.* [1984] 2 MLJ 300 and *European Asian Bank v. Punjab & Sind Bank (No. 2) (C.A.)* [1983] 1 WLR 643; [1983] 2 All ER 508, 516

In this appeal, Counsel for the appellant attacked the decision of the learned Judge, particularly on his finding that there was a triable issue with respect to the duty of care owed by the appellant to the respondents in realising the securities of the respondents. Counsel submitted that the Judge misconstrued *China and South Sea Bank Ltd. (supra)* wherein the Privy Council had already held that the bank owed no duty of care to guarantors to exercise its power of sale over the mortgaged securities. Counsel further submitted that the three cases relied on by the Judge in preference to the *China and South Sea Bank Ltd. Case (supra)* was wrong by virtue of the doctrine of *stare decicis*. In our view, what is involved in this appeal is a

question of triable issues arising as a matter of evidence and fact as opposed to law. The Judge's finding that it is arguable whether the appellant as mortgagees had exercised their duty of care and whether the bank had acted in good faith in the disposal of the said securities are derived from the evidence and the circumstances he found them in the case. In this respect, the function of the appellate Court should be as what was said by Goff LJ (as he then was) in *European Asian Bank (supra)* at p. 654:

> If the Judge has already decided, on the evidence, that there is a triable issue on a question of fact, it must in the very nature of things be unlikely that this Court will interfere with his decision and decide that no trial should take place; because, where such an action has already been ruled by the Judge, this court will be very reluctant to hold that there is no issue or question which ought to be tried.

Referring to *Cow v Casey*, Goff LJ went on to state:

> But where the appeal raises a question of law, this Court may be more ready to interfere. Moreover, at least since *Cow v. Casey* [1949] 1 All ER 197, [1949] 1 KB 474, this Court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O. 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand.' It may offend against the whole purpose of O. 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the Court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a Judge, with the possibility of yet another appeal.

In *Lloyds Bank Ltd. v. Ellis-Fewster* [1983] 1 WLR 559 CA Sir John Donaldson M.R. (as he then was), stated at p. 652 as follows:

> In a case where the triability of the issue depends upon evidence as opposed to law, I would think it a very surprising situation if the Court of Appeal was prepared to disturb the Judge's view. If one Judge thinks there is a triable issue, it would be surprising if two or three Judges think there is not. It is quite different if your are dealing with a triable issue which arises as a matter of law. **When it arises as a matter of evidence and fact, it is mot unlikely that the Court of Appeal would interfere with the discretion of the Judge below.**
> (Emphasis added).

In the present appeal, since the triable issues, as found by the learned Judge, arose as a matter of evidence, following the above principles, it would be wrong for this Court to interfere with the learned Judge's discretion. Furthermore, upon considering the issues raised in the Amended Defence, we find ourselves in complete agreement with the conclusions of the learned Judge. Accordingly, we hold that this is not an appropriate case for summary judgment.

This appeal is dismissed with costs. We direct that this case be remitted to the High Court below to be tried together with Kuala Lumpur High Court Civil Suit No. D1-23-2927-1988 by Dato' Zakaria J.